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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

MICHAEL RHOM, individually and on behalf of a class of similarly situated individuals,

Plaintiff,

v.

THUMBTACK, INC., a Delaware corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No. 3:16-cv-02008-HSG

CLASS ACTION

NOTICE OF PLAINTIFF'S UNOPPOSED MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY APPROVAL HEARING
Hearing Date: February 9, 2017
Time: 2:00 p.m.
Judge: Haywood S. Gilliam, Jr.
Ctrm.: 10, 19th Floor

Complaint Filed: March 22, 2016
Trial Date: None Set

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 9, 2017, at 2:00 p.m., or a soon thereafter as counsel may be heard in Courtroom 10 on the 19th Floor of the above-entitled Court located at San Francisco, California, Plaintiff Michael Rhom ("Plaintiff") hereby does move the Court for an order granting preliminary approval of the class action settlement ("Settlement") reached with Defendant Thumbtack, Inc. ("Defendant"), a true and correct copy of which is attached at Exhibit "1" to the Declaration of Anthony J. Orshansky submitted herewith. Specifically, Plaintiff moves for an order:

1. Granting preliminary approval of the terms of the Settlement as fair, reasonable and adequate under Rule 23(e) of the Federal Rules of Civil Procedure, including the amount of the settlement fund; the procedure for giving notice to class members; the procedure to opt out and/or object to the Settlement; the procedure for submitting claims; and the amounts allocated as incentive payment, costs, and attorney's fees;

2. Preliminarily certifying for settlement purposes the Settlement Class described in the Settlement as follows:

> All service professionals in the United States who accessed and/or used the Thumbtack platform on whom Thumbtack obtained a report through Checkr or Sterling from March 22, 2011 through present who had not yet agreed to Thumbtack's December 11, 2015 Terms of Use or subsequent Thumbtack Terms of Use at the time the report was obtained by Thumbtack. Excluded from the Settlement Class are the following: (1) Defendant, its subsidiaries, and affiliates and their respective current officers, directors and employees, (2) Class Counsel and Defendant's Counsel, and (3) any judicial officer to whom the Action is assigned.

3. Appointing Plaintiff as representative for the Settlement Class;

4. Appointing CounselOne, P.C. as counsel for the Settlement Class;

5. Appointing CPT Group, Inc. as the Settlement Administrator;

6. Directing the Settlement Administrator to provide class notice to

members of the Settlement Class as provided in the Settlement Agreement, including the Class Notice in the forms attached as Exhibit "B" and "C" to the Settlement and the Claim Form in the form attached as Exhibit "A" to the Settlement; and

7. Scheduling a final approval and fairness hearing to consider whether the Settlement should be finally approved as fair, reasonable, and adequate under Rule 23(e) of the Federal Rules of Civil Procedure and to rule on the motion for attorney's fees, costs, and incentive payments submitted by Plaintiff.

Plaintiff's motion is based on this Notice, the attached Memorandum of Points and Authorities, the Declaration of Anthony J. Orshansky submitted herewith, all other pleadings and papers on file in this action, and any oral argument or other matter that may be considered by the Court.

Dated: November 16, 2016

Respectfully submitted,

COUNSELONE, PC

By: /s/ Anthony J. Orshansky
Anthony J. Orshansky
Justin Kachadoorian
Attorneys for Plaintiff and Settlement Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Michael Rhom ("Plaintiff" or "Class Representative"), individually and on behalf the Settlement Class seeks preliminary approval of the proposed Settlement Agreement with Defendant Thumbtack, Inc. ("Defendant" or "Thumbtack"). The Settlement Agreement between Plaintiff and Defendant (collectively, the "Parties"), if approved, will resolve all claims of Plaintiff and of the Settlement Class in exchange for Defendant's agreement to pay $225,000 into a common settlement fund.

The proposed settlement of this action is the product of hard-fought and lengthy arm's length negotiations by experienced and informed counsel and warrants preliminary approval, as the terms are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

II. PLAINTIFF'S CLAIM AND LITIGATION HISTORY

Plaintiff Michael Rhom operated a successful tree-trimming business in Florida. Defendant Thumbtack runs an online platform ("thumbtack.com") that allows people who need help with service projects to solicit bids from service professionals and contract with them to meet their needs. *See* Complaint ¶ 12, Dkt No. 1. Defendant advertises its platform to service professionals as a place where they can develop their businesses. *Id.* at ¶13. In order for service professionals to bid on projects posted by users, service professionals must use credits purchased from Defendant. *Id.* at ¶ 12. Plaintiff was a service professional who connected with customers via the Thumbtack platform. *Id.* Plaintiff alleges that Thumbtack procured an investigative consumer report on him and, based on the information contained therein, terminated his account. *Id.* at 16. Plaintiff alleges that Thumbtack's actions prevented him from obtaining clients and also obtaining employment with other businesses that use the digital platform. Id. at 2.

Based on the foregoing, Plaintiff filed this class action against Thumbtack on March 22, 2016 in the Superior Court of the State of California in and for the County of San Francisco, captioned *Rhom v. Thumbtack, Inc.*, Case No. CGC 16-551067. Plaintiff asserts violations of (1) the Fair Credit Reporting Agency ("FCRA") (15 U.S.C. § 1681 *et seq*.); (2) California's Investigative Consumer Reporting Agencies Act ("ICRAA") (Cal. Civ. Code § 1786 *et seq*.); and (3) California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq*.) ("UCL"). *See* Complaint attached at Exhibit "1" to Notice of Removal, Dkt. No. 1 (outlining nine causes of action).

A Florida resident, Plaintiff owns a professional tree-trimming business that provides services in the tri-county (Seminole, Orange, Osceola) area of Florida. Complaint ¶ 2. Plaintiff alleges that he advertised his services and used Thumbtack's website platform to develop a profitable business; indeed Plaintiff owned the number one tree-trimming business on Thumbtack for that tri-county area. *Id.* ¶¶ 2, 13. Plaintiff claims that in or around October 2015, Thumbtack obtained a consumer report on Plaintiff from Checkr, a consumer reporting agency, and on the basis of criminal activity contained in the report terminated his account. *Id.* ¶¶ 16, 20. As a result of Thumbtack disabling his account as a service professional, Plaintiff alleges that he was prevented from obtaining tree-trimming clients. *Id.* ¶ 2.

Plaintiff complains that despite representing that it was obtaining consumer reports for "employment purposes," Thumbtack failed to comply with federal and state regulations governing the acquisition of consumer reports. *Id.* ¶ 4. Plaintiff specifically alleges that Thumbtack failed to provide him and other service professionals with the requisite clear and conspicuous written disclosures and information before a consumer report was procured. *Id.* ¶¶ 17-19. Plaintiff also asserts that Thumbtack failed to obtain his authorization, and those of other service professionals, before obtaining consumer reports. *Id.* at 17. Moreover, Plaintiff alleges that Thumbtack did not provide the required notice and copies of consumer reports in its pre-adverse and post-adverse actions against him (*i.e.*, unilateral termination of Plaintiff's account) and other service professionals. *Id.* ¶¶ 20-21. Finally, to the extent Thumbtack contends it did not procure reports for employment purposes, Plaintiff asserts that it lacked permissible purposes, used false pretenses, and/or made inaccurate certifications to consumer reporting agencies. *Id.* ¶¶ 23-26.

Thumbtack vigorously disputes liability in this litigation. On April 15, 2016, Thumbtack removed this case to the United States District Court for the Northern District of California, where it is captioned as *Rhom v. Thumbtack, Inc.*, Case No. 3:16-cv-02008-HSG. *See* Notice of Removal, p. 1 (stating "To the contrary, Thumbtack disputes Plaintiff's and proposed classes' claims in their entirety. Thumbtack denies the allegations and damages claimed in the Complaint…"). Thumbtack argues that because it obtained Plaintiff's report in connection with a commercial transaction, FCRA does not apply to his claims at all. Reply in Supp. of Def's Mot. to Dismiss at 1. Thumbtack also argues that if FCRA does apply, no employment relationship exists between it and Plaintiff, since Thumbtack did not control the manner and means of Plaintiff's work, making his employment-based arguments irrelevant. *Id.* Thumbtack also argues that it had multiple permissible purposes for obtaining the report in question, and that it complied with any and all applicable notice and disclosure requirements (including those related to adverse action), and provided proper certifications to consumer reporting agencies.[1] *Id.* at 1-2. Finally, Thumbtack argues that any violation of FCRA that may have occurred was not willful, and that Plaintiff has not been injured by its "purported technical violations" of FCRA; accordingly, he can recover no damages. *Id.* at 12 (quoting *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1550 (2016)). Notwithstanding Defendant's

[1] Furthermore, as detailed in the settlement agreement, Thumbtack continues to maintain that it has valid defenses "in opposition to class certification of the claims alleged in the Action." Declaration of Anthony J. Orshansky, Ex. 1, at 2. For that reason, the agreement provides that if this settlement is not approved, Thumbtack retains its rights "to object to the maintenance of the Action as a class action." *Id.* at ¶ 9.1. For example, Thumbtack retains its right to argue that individual issues concerning the contents of any report obtained on class members (and Thumbtack's actions upon receipt of such a report) may predominate over common legal questions, or that Plaintiff is an inadequate class representative.

litany of defenses, Plaintiff argues that these contentions lack factual and legal merit and would be unlikely to prevail in the course of further discovery and presentation of countervailing arguments.

On June 2, 2016, Thumbtack moved to dismiss or, in the alternative, stay the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). *See* Motion to Dismiss, Dkt. No. 12. The legal issues for adjudication in the Motion to Dismiss are as follows: (1) Whether Plaintiff alleged a concrete and particularized injury sufficient for standing; (2) Whether the relationships between Thumbtack, Thumbtack users, and service professionals constitutes that of an independent contractor or employment; (3) Whether there exists a private right of action for post-adverse action notice violations; (4) Whether FCRA applies to consumer reports obtained for commercial purposes; (5) Whether Thumbtack's interpretations of FCRA is objectively reasonable; and (6) Whether the case should be stayed pending the Ninth Circuit's decisions in *Spokeo v. Robins* and *Moran v. Screening Pros LLC*?[2] *See* Joint Case Management Statement, pp. 2-3, Dkt. No. 24. Although fully briefed and argued by the Parties on August 4, 2016, the Court has not yet ruled on Thumbtack's motion.

III. SETTLEMENT OF THE ACTION

Over the course of this case the Parties exchanged Rule 26(a) disclosures, as well as documents, information, and data regarding the alleged claims, and vigorously discussed and debated the legal authority supporting their positions. (Orshansky Decl. ¶¶ 4-8.) The Parties also participated in an ADR Phone Conference on July 8, 2016 that did not result in resolution. (Dkt. No. 23.) In light of the uncertain outcome and risks of further litigation—including Defendant's motion to dismiss, the potential impact of two FCRA and ICRAA cases (*i.e.*, *Spokeo* and *Moran*) pending before the Ninth Circuit, and prospects of class certification—the Parties engaged in arm's-length negotiations in good faith and reached the terms of the proposed settlement. (Orshansky Decl. ¶¶ 7-9.) On September 8, 2016, the Parties executed a written

[2] *Robins v. Spokeo, Inc.*, No. 11-5694 (regarding issues of injury and standing) and *Moran v. Screening Pros LLC*, No. 12-57246 (regarding ICRAA right to bring a cause of action).

settlement term sheet, and a formal settlement agreement was executed on November 16, 2016. A true and correct copy of the Settlement Agreement is attached as Exhibit "1" to the Declaration of Anthony J. Orshansky filed concurrently herewith.

A. The Proposed Settlement

The Settlement Agreement defines "Settlement Class" as follows:

> All service professionals in the United States who accessed and/or used the Thumbtack platform on whom Thumbtack obtained a report through Checkr or Sterling from March 22, 2011 through the present who had not yet agreed to Thumbtack's December 11, 2015 Terms of Use or subsequent Thumbtack Terms of Use at the time the report was obtained by Thumbtack. Excluded from the Settlement Class are the following: (1) Defendant, its subsidiaries, and affiliates and their respective current officers, directors and employees, (2) Class Counsel and Defendant's Counsel, and (3) any judicial officer to whom the Action is assigned.

Settlement Agreement ¶ 1.31.

Under the Settlement Agreement Defendant shall contribute $225,000 to a Settlement Fund ("Settlement Fund"), which shall be distributed according to the terms of the Settlement Agreement as described below. Settlement Agreement ¶ 1.33. The Settlement Fund is ***non-reversionary***. Settlement Agreement ¶¶ 1.9, 2.1. Every settlement class member who returns a claim form will be entitled to a *pro rata* distribution from the settlement. The *pro rata* distribution will be made after payment of attorney's fees, expenses, and class representative incentive award as approved by the Court, along with the Settlement Administration and Notice expenses. Settlement Agreement ¶¶ 2.1, 3.1. Any undistributed funds that cannot be distributed *pro rata* to Authorized Claimants will be donated in *cy pres* to the Electronic Privacy Information Center ("EPIC"). *Id.* at ¶¶ 3.1.2(b), 3.1.3.

B. Settlement Notice, Claims, And Opt-Out Procedure

Subject to preliminary approval, Thumbtack will provide the Settlement Administrator the email address that it has on file for the Thumbtack account for each Settlement Class Member. The Settlement Administrator—and the Parties propose CPT Group, Inc. ("CPT")—shall then send or cause to be sent an Email Notice to each Settlement Class Member substantially in the form of the [Proposed] Email Notice attached at Exhibit "B" to Settlement Agreement. The Email Notice shall include a hyperlink to the Settlement Website. Settlement Agreement ¶ 5.1.1. For emails that result in a bounce-back or are otherwise undeliverable, an attempt will be made to re-send the Email Notice once prior to the expiration of thirty (30) days after the date of entry of the Preliminary Approval Order ("Notice Date"). Settlement Agreement ¶¶ 1.20, 5.1.1.

Moreover, the Settlement Administrator shall, no later than the start of the Email Notice dissemination, develop, host, and maintain a Settlement Website that includes the Website Notice, substantially in the form of the [Proposed] Website Notice attached at Exhibit "C" to the Settlement Agreement. Settlement Class Members will have sixty (60) days form the Notice Date to submit claims, opt-out of, or object to the Settlement. Settlement Agreement ¶ 1.4. The Parties have obtained a bid from CPT that notice and administration expenses are estimated at $62,000; CPT was selected after competitive bidding and because of its status as a well-known administration firm. (Orshansky Decl. ¶ 10).

The Claim Form will have an option for the Settlement Class Member to indicate whether he or she would like to receive distribution by direct deposit/Automated Clearing House or by physical check. Settlement Agreement ¶ 3.1.2(a)-(b). *See also* [Proposed] Claim Form attached at Exhibit "A" to the Settlement Agreement. If the form is returned completed within the designated deadline, and the Settlement Administrator has no reason to find that the claimant falls outside of the Settlement Class definition, the Settlement Class Member will be entitled to distribution from the Net Settlement Fund. A Settlement Class Member may file only one (1) Claim Form, regardless of how many Thumbtack Accounts he, she, or it may have. Settlement Agreement ¶ 3.2.1.

Settlement Class Members who do not wish to participate in the Settlement may request to be excluded from the Settlement Class by sending in a written request for exclusion within sixty (60) days from the Notice Date ("Objection/Exclusion Deadline"). Settlement Agreement ¶ 6.2. Likewise, Settlement Class Members who wish to object to the Settlement and/or the application for the Fee Award or Incentive Award may do so by submitting to the Court, and serving upon Class Counsel and Defendant's Counsel, a written objection no later than sixty (60) days from the Notice Date, or Objection/Exclusion Deadline. Settlement Agreement ¶ 6.3.

C. Attorneys' Fees, Expenses, and Incentive Award

The Settlement Agreement provides that Class Counsel may move for the Court to award attorney's fees and expenses to be paid from the Settlement Fund. The Fees Award is an amount not to exceed 25% of the Settlement Fund or $56,250. Settlement Agreement ¶ 8.1. Class Counsel may also seek reimbursement of costs in an amount up to $2,500. Class Counsel may also petition this Court on behalf of the named Plaintiff for an incentive award in an amount not to exceed $5,000. Settlement Agreement ¶ 8.2. Papers supporting Class Counsel's petition for a fee award, reimbursement of expenses, and incentive award shall be filed with the Court, and posted by the Settlement Administrator on the Settlement Website, no later than fourteen (14) days before the Objection/Exclusion Deadline. Settlement Agreement ¶¶ 8.1- 8.2.

IV. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

Rule 23 allows courts to conditionally or provisionally certify a class for purposes of effectuating a settlement. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 793-794 (3rd Cir. 1995); *White v. Experian Info. Solutions, Inc.* 803 F.Supp. 2d 1086, 1094 (C.D. Cal. 2011) ("Where, as here, 'the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.")

To certify a class, the court must find that the prerequisites of Rule 23(a) are met and that the case falls within at least one of the categories listed in Rule 23(b).

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998); *Legge v. Nextel Communications, Inc.*, 2004 WL 5235587, *1 (C.D. Cal. June 25, 2004). The same standards generally apply where certification is sought for settlement purposes only, although issues of manageability at trial are not relevant. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Both Rule 23(a) and Rule 23(b) are satisfied here.

A. Rule 23(a) Requirements

Under Rule 23(a), one or more persons may sue as representative parties on behalf of a class if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

a) Numerosity

A class action can only be maintained where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *Legge*, 2004 WL 5235587, *4. But "[t]here is no absolute number at which joinder becomes impracticable. *Id*. (citing *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed. 2d 319 (1980)).

Based on data stored related to users of its platform and information disclosed in discovery, there are approximately 66,797 unique service professionals in the Settlement Class. (Orshansky Decl. ¶ 22(a).) Defendant's records indicate that the 66,797 total is comprised of 64,134 persons for whom reports were obtained from Sterling and 2,663 persons for whom reports were obtained from Checkr consumer reporting agencies. (Orshansky Decl. ¶ 22(a).) Following the other cases in this Circuit, the numerosity requirement is thus satisfied. *See, e.g.*, *Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated and rem'd on other grounds*, 459 U.S. 810 (1982) ("we would be inclined to find the numerosity requirement in the present case satisfied solely on the basis of the number of ascertained class members, *i.e.*, 39, 64, and 71."); *Ashmus v. Calderon*, 935 F.Supp. 1048, 1064 (N.D. Cal. 1996) (certifying a class of 52 members).

b) Commonality

Under Rule 23(a)(2), a class must have sufficient commonality, which "requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551, 180 L.Ed. 2d 374 (2011) (quotation omitted). This requirement is construed "permissively." *Legge,* 2004 WL 5235587, at *5 (citing *Hanlon*, 150 F.3d at 1019). Commonality is evaluated as to whether the complaint truly "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S.Ct. at 2551.

"[C]ommonality is often found in consumer fraud and related actions where standardized documents and procedures are used. This is true for violations of FCRA and ECOA." *Legge*, 2004 WL 5235587 at *5 (citing *Clark v. Experian Info. Solutions, Inc.*, 2002 U.S. Dist. LEXIST 20410, *11 (D.S.C. June 26, 2002)(holding that common questions predominate in FCRA action, including whether a "particular practice or policy of writing credit reports" was reasonable)).

By definition, members of the Settlement Class share the same questions of law and fact. The members of the Settlement Class are alleged to be victims of Defendant's policies and procedures whereby Thumbtack wrongfully acted and/or omitted acts in connection with its procuring and taking adverse action based consumer reports obtained on Plaintiff and service professionals. Here, common questions include, but are not limited to, the following: whether Thumbtack obtained consumer reports for employment purposes; whether it provided requisite standalone disclosures; whether it obtained valid authorization before procuring consumer reports; whether it failed to provide copies of consumer reports before taking adverse action; whether it failed to provide post-adverse action notice; whether it obtained consumer reports or investigative reports under false pretenses; and whether it failed to certify or accurately certify a permissible purpose for obtaining consumer or investigative reports. (Orshansky Decl. ¶ 22(b).)

Commonality has been found in similar FCRA-based cases, including claims for failure to provide pre-adverse action notice. *See, e.g., Reardon v. Closetmaid Corp.*, 2011 U.S. Dist. LEXIS 45373, at *14 ("Here, there are numerous questions of law or fact common to the class. These include, but are not limited to…whether [defendant] relied on derogatory information in consumer reports to deny employment to the sub-class members in violation of the FCRA…"); *Singleton v. Domino's Pizza, LLC*, 976 F.Supp.2d 665, 675 (D.Md. 2013) (finding common question of "whether [defendant] violated the FCRA by failing to provide employees with copies of their consumer reports and pre-adverse action notice"). The theories of liability as to all Settlement Class members, therefore, arise from the same practices and present basic questions that are common to all class members.

c) Typicality

For similar reasons, named Plaintiff's representative claims satisfy the typicality requirement of Rule 23(a)(3). Typicality and commonality are similar and tend to merge. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; *accord Legge*, 2004 WL 5235587 at *8 ("As a result of the uniformity with which [Defendant] treated its customers, the Plaintiffs' experiences and claims in some way are typical of those of the class.").

In the instant case, Plaintiff asserts claims that arise from the same policies, procedures and course of conduct that give rise to the claims of other class members. Plaintiff and the Settlement Class Members were subject to the same written "Terms of Use" policies, along with the same course of conduct, by Thumbtack in the manner in which it procured consumer reports and/or investigative consumer reports on service professionals. Thus, all Settlement Class Members arguably have claims under FCRA—*i.e.*, 15 U.S.C. §§ 1681(b)(2)(A); 1681b(a),(f); 1681e(a); or 1681q (depending on Thumbtack's purpose in obtaining the reports)—for improper authorization and procurement of reports. (Orshansky Decl. ¶ 22(c)). Consequently, in seeking to prove his claims, Plaintiff will necessarily advance the claims of the Settlement Class.

d) Adequacy of Representation

To make a determination on adequacy, the Court must evaluate both the Plaintiff and his counsel:

> Resolution of two questions determines legal adequacy: 1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and 2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?

Hanlon, 150 F.3d at 1020. All factors support certification here. There are no conflicts of interest between Plaintiff and Settlement Class Members (Orshansky Decl. ¶ 22(d).) Also, there are no conflicts with Class Counsel. (Orshansky Decl. ¶ 22(d)). Moreover, Plaintiff has retained qualified and experienced attorneys to represent him and the class in this matter. Class Counsel has substantial class action experience and can adequately represent the Settlement Class. They have been appointed class counsel in other FCRA-related class actions, along with numerous consumer and wage and hour class actions. (Orshansky Decl. ¶¶ 23-26). Information about the qualifications of CounselOne, P.C. are included in the Orshansky Decl. filed concurrently herewith.

B. Rule 23(b)(3) Requirements

The Settlement contemplates provisional class certification under Rule 23(b)(3). If the elements of Rule 23(a) are satisfied, then a class action may be certified provided the court finds that certain other requirements under Rule 23(b)(3) are met: (1) questions of law or fact common to class members predominate over questions affecting only individual members, and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3); *Hanlon*, 150 F.3d at 1022.

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods*., 521 U.S. at 623. Predominance is similar to, but "far more demanding" that the commonality requirement. *Id*. at 623-624. The predominance requirement is satisfied because common questions present a "significant portion of the case" that can be resolved for all class members in a single adjudication. *See Gutierrez v. Wells Fargo Bank, N.A.*, 2008 WL 4279550, *14 (N.D. Cal. Sept. 11, 2008) (citing *Hanlon*, 150 F.3d at 1019-1022)).

As discussed in the commonality and typicality sections above, the central issues in this litigation are common to all members of the proposed Settlement Class, *e.g.*, (1) whether Defendant was required and failed to provide a clear and conspicuous disclosure before procuring consumer reports (15 U.S.C § 1681b(b)(2)(A)); (2) whether Defendant, if it did not have an employment purpose, lacked a permissible purpose when it obtained consumer reports (15 U.S.C. § 1681b(a)); and (3) whether Defendant, if it did not have an employment purpose, failed to accurately certify its permissible purpose for obtaining consumer reports to the consumer reporting agency and/or obtained consumer reports under false pretenses (15 U.S.C. §§ 1681b(f), 1681e(a), and 1681q). Moreover, these claims susceptible to common proof, namely, Defendant's disclosure and authorization forms and certifications, as well as policy and procedures documentation.

Each of the above common questions predominates over individual questions—including any individualized issues relating to adverse actions taken by Thumbtack against service professionals. It is well settled that the need to determine differing amounts of damages suffered by different class members does not preclude class certification. *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). The FCRA provides mandatory statutory damages for willful violations. *See* 15 U.S.C. § 1681n.

Settlement Class Members who perceive that they have actual damages as a result of failing to receive adverse action notice may opt out of the Settlement. This ability to opt out has been held to sufficiently protect those class members in similar cases. *See Egge v. Healthspan Services Co.*, 208 F.R.D. 265, 272 (D. Minn. 2002) ("[defendant's] alleged concern that individual class members may be able to recover more in individual actions is adequately addressed by use of the Rule 23(b)(3) opt-out procedures.") (quotation omitted). For these reasons, the predominance requirement is met.

Additionally, adjudicating the facts presented in this action on a class wide basis would be superior to alternative methods of adjudication. "The superiority requirement is generally satisfied where there are 'multiple claims for relatively small individual sums." *Legge*, 2004 WL 5235587 at *12 (quoting *Local Joint Exec. Bd. Of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001)). This is because "[w]ithout a class action, the costs of individual litigation as compared to the amount of damages may be prohibitively high," or "the individual plaintiffs' claims are so small that denying class certification would effectively preclude any recovery." *Id.* (recognizing that a class action may not only be the superior method of adjudication of multiple claims with small damages, but may be the only realistic means for class members to adjudicate their claims).

The interests of the Settlement Class would not be better served by prosecuting their claims individually. *See* Fed. R. Civ. P. 23(b)(3)(A)-(B). Indeed, a class action is the only feasible means by which affected service professionals can effectively challenge Defendant's conduct, given the relatively modest size of individual claims under the FCRA, which provides for statutory damages of only $100-$1,000 per violation,[3] and the vast superior resources with which Defendant has to defend itself.

[3] Although the FCRA does provide for recovery of actual damages, 15 U.S.C. § 1681o(a) (actual damages for negligent FCRA violation) and 1681n(a) (actual damages for willful FCRA violation), such damages may only be sought where the damages are the result of the violation at issue. *See Caltabiano v. BSB Bank & Trust Co.*, 387 F.Supp.2d 135 (E.D.N.Y. 2005 (debtor suing credit agencies unable to recover actual damages where loan rate increase was based on market rate rather than credit report).

It is therefore desirable to litigate the issues in this forum on a classwide basis. *See id*, at 23(b)(3)(C).

C. The Settlement Satisfies the Standard for Preliminary Approval.

The proposed Settlement Agreement in this case, which provides for a ***non-reversionary*** monetary recovery of $225,000, meets the standard for preliminary approval.

a) The Settlement Is the Product of Serious, Informed, Non-Collusive Negotiations.

As recounted above, the settlement in this case was the result of arm's-length negotiations after substantial discovery. (Orshansky Decl. ¶ 9.) "An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining." *Riker v. Gibbons*, 2010 WL 4366012, at *2 (D. Nev. Oct. 28, 2010); *see also Hanlon*, 150 F.3d at 1027 (affirming approval of settlement after finding "no evidence to suggest that the settlement was negotiated in haste or in the absence of information illuminating the value of plaintiff's claims").

Here, Class Counsel is experienced in FCRA, consumer, and wage-and-hour class-action litigation and endorse the settlement as fair and adequate under the circumstances. In counsel's opinion, there is no obvious deficiency in the class settlement. Moreover, the action has been vigorously litigated by the Parties and sufficient information has been obtained by Plaintiff to assess the strengths of his respective claims and defenses. The Parties have had the opportunity to brief and argue potentially dispositive motions, upon which the Court has yet to rule. *See* Dkt. Nos. 12, 16, and 22. The Parties also reached a settlement after the Supreme Court issued its ruling in *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (May 16, 2016), which is currently on remand to the Ninth Circuit. Thus, the instant settlement saves significant judicial resources by resolving the litigation without lengthy litigation, costly trial, and possible appeal.

b) The Settlement Has No Deficiencies.

As an initial matter, notice will be sent to: 1) all service professional in the United States who accessed or used the Thumbtack platform; 2) for whom Defendant obtained a report from Checkr or Sterling from March 22, 2011 to the present; and 3) did not agree to Thumbtack's December 11, 2015 Terms of Use (or subsequent Terms of Use) at the time the report was obtained. Settlement Agreement ¶¶ 1.31 and 3.2.2. Because Thumbtack collects and keeps email addresses for such service professionals, the Parties anticipate that, except for any bounce-back issues like incorrect addresses, etc., all Settlement Class Members should be reachable. Thus, direct email notice encompasses the entire universe of Settlement Class Members nationwide. Moreover, given that Thumbtack is an online marketplace, email is not only an appropriate method of notice, but also the most suitable method.

Significantly, the totality of the Settlement will be paid out; there is no reversion to Defendant. All deductions from the Settlement Fund, such as attorneys' fees and expenses, incentive award, and settlement administration expenses, require judicial approval and will be disclosed to the Settlement Class. Further, Settlement is not contingent upon approval of the requested amounts for the foregoing items.

c) The Settlement Does Not Grant Preferential Treatment.

Preferential treatment is not a concern in this case. The Settlement Class is for the certification of a single class, with no sub-classes. Every Settlement Class Member will be treated equally, and have an equal opportunity to claim a *pro rata* share of the Settlement Fund. The Settlement does call for an incentive award for the Plaintiff, but the award is subject to the Court's review and approval, and is warranted based on his initiative in bringing and helping to prosecute this action. The Ninth Circuit has recognized that service awards to named plaintiffs in a class action are permissible and do not render a settlement unfair or unreasonable. *See Stanton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-969 (9th Cir. 2009).

d) The Settlement Is Adequate and Reasonable.

While the exact amount that each participating Settlement Class Member will recover is unknown until the number of claims filed is determined, the gross settlement amount of $225,000 is substantial, and Settlement Class Members filing claims are likely to recover a substantial portion of what they could have recovered in litigation.

In circumstances such as this, where a settlement fund is calculated to pay out in its entirety, and where claiming class members are likely to receive a good result, a settlement should be approved. The FCRA sets up a two-tiered system for allocating damages to plaintiffs who are aggrieved by the FCRA violations, depending on whether the defendant’s violation was willful or negligent. The statutory penalty of $100 to $1,000 is available only if Plaintiff can establish willful violations of the FCRA. 15 U.S.C. § 1681n(a)(1)(A). If the Defendant’s violation was at most negligent, recovery is limited to actual damages. *See* 15 U.S.C. § 1681o(a)(1). The FCRA’s willfulness standard is important because, in the absence of willfulness, Plaintiff must prove that Defendant’s alleged FCRA violations caused actual damages in order to recover. Under either theory, a prevailing plaintiff is entitled to recover attorneys’ fees and costs.

If a 10 percent participation rate is achieved in this case, the payout to claiming Settlement Class Members would result in almost $15.00 per claim. Courts have approved settlements, including FCRA settlements, within this range and even less, as well as coupon-based settlements. *See, e.g., Coletta v. Univ. of Pittsburgh*, 569 F.Supp.2d 525, 534 (W.D. Pa. 2008)(approving FACTA credit-card truncation settlement agreement that provided each class members a free ticket, with a face value of $10, to one of two Pittsburgh spring football games); *Weber v. Goodman*, 9 F.Supp.2d 163, 170-171 (E.D.N.Y. 1998) (deciding a class action in an FDCPA case where individual claims could have resulted in recoveries of $1,000 per individual was superior even though the class members would receive no more than $2 in statutory damages for the defendant's FDCPA violation); *De Santos v. Jaco Oil Co.*, 2015 WL 4418188, at *8 (E.D. Cal. July 17, 2015)(finding settlement where class members received 50% of potential $100 under FCRA provided adequate compensation for class members in FCRA, ICRAA, and CCRAA class action because without actual injury class members could not receive the maximum statutory damages); *Barel v. Bank of America*, 255 F.R.D. 393, 404 (E.D. Pa. 2009)(approving settlement agreement that provided four months of free credit monitoring, with a retail value of $52, to consumers who were the subject of a consumer report procured without a permissible purpose); *Hanlon v. Aarmark Sports, LLC*, 2010 WL 374765, *5 (W.D. Pa. 2010) (approving FACTA credit-card truncation settlement agreement that provided each class member $50 worth of merchandise at defendant's retail store).

The essence of settlement is compromise, so "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2nd Cir. 1974). Courts aptly hold that "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Linney v. Cellular Alaska Partnership*, 1997 WL 450064, at *5 (N.D. Cal. Jul. 18, 1997)(emphasis omitted).

Here, although the gross amount is less than $100, there are serious risks to litigation, including: the risks of adverse decisions in either (or both) *Spokeo* or *Moran*; a ruling that Thumbtack obtained reports for permissible non-employment purposes; a finding that Thumbtack's disclosure notices and certifications complied with FCRA; a finding that the reports Thumbtack obtained were not "consumer reports"; or that Thumbtack's conduct even if wrongful, was not willful. (Orshansky

Decl. ¶ 16.) Defendant also changed its Terms of Use on or about December 11, 2015, undercutting the factual and legal arguments raised by Plaintiff beyond that date. (Orshansky Decl. ¶ 16.)

Viewed in the context of the litigation risks faced, as well as the substantial delay, and costs that class members would have experienced in order to receive proceeds from an adversarial-obtained judgment, not to mention the judicial resources required, this settlement is in the best interests of the Plaintiff and the Settlement Class Members, and should be approved.

D. The Court Should Approve Dissemination of the Class Notice.

With this motion, Plaintiff has provided two forms of notice to be provided to Settlement Class Members. *See* [Proposed] Email Class Notice and [Proposed] Website Class Notice attached at Exhibits "B" and "C" respectively to the Settlement Agreement. These proposed notices include all of the information required by Fed. R. Civ. P. 23(c)(2)(B). The Website Notice contains details about the definition of the Settlement Class, the proposed Class Counsel, the size of the Settlement Fund, the methodology for opting out of or objecting to the Settlement, the potential size of Plaintiff's request for attorneys' fees, expenses, and class representative incentive award, and the date and location of the final approval hearing.

Moreover, the manner of dissemination of notice via email and website posting is the "best notice practicable" given the circumstances because Defendant operates an online platform that Settlement Class Members accessed electronically. *See Lane v. Facebook, Inc.*, 2010 WL 9013059, *1 (N.D. Cal. March 17, 2010) (finding that email notice "fully and accurately informed the Settlement Class Members of all the material elements of the proposed Settlement."). Thus, this notice program satisfies the requirements of Fed. R. Civ. P. 23, and should be approved.

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V. CONCLUSION

The Settlement Agreement is in the best interest of the Parties and is fair and reasonable to all concerned. Therefore the Parties respectfully request that the Court enter an order: (1) preliminarily approving the Settlement Agreement between Plaintiff, on his own behalf and on behalf of the Settlement Class of similarly situated service professionals meeting the definition of the Settlement Class; (2) preliminarily certifying the above-described Settlement Class for settlement purposes; (3) approving the form and manner of Notice (Email Notice and Website Notice); and (4) scheduling a final fairness hearing for the final consideration and approval of the Settlement Agreement.

Dated: November 16, 2016

Respectfully submitted,

COUNSELONE, PC

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